

FCC MAIL SECTION

DEC 8 1993
Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 93-295 ✓

In the Matter of

Amendment of Section 73.202(b), RM-8362
Table of Allotments,
FM Broadcast Stations.
(San Clemente, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1993; Released: December 8, 1993

Comment Date: January 31, 1994

Reply Comment Date: February 15, 1994

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Memo-randum Opinion and Order* in MM Docket No. 89-503, directing the initiation of a notice and comment rule making proceeding proposing the deletion of Channel 285A, San Clemente, California, from the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See 8 FCC Rcd 3123 (1993). The Commission's directive is based upon the evidence and findings adduced in the context of the comparative proceeding in MM Docket No. 89-503, which ultimately led to an affirmance of the denial of two comparative applications for Channel 285A at San Clemente premised upon the applicants' failure to specify sites complying with the requirements of Section 73.207 of the Commission's Rules, or to justify waivers thereof. See *On the Beach Broadcasting*, 7 FCC Rcd 1346 (Rev. Bd., 1992).

BACKGROUND

2. In 1985, the Commission, acting in response to a rule making request, allotted Channel 285A to San Clemente, California, as its second local FM service at a restricted site located 8.9 kilometers (5.5 miles) southeast of the commu-nity.¹ See *San Clemente, California (Report and Order)*, 50

FR 8226, published March 1, 1985, *recon. denied*, Mimeo No. 6821, August 13, 1986, *review denied*, 2 FCC Rcd 2514 (1987), *recon. denied*, 3 FCC Rcd 6728 (1988), *appeal dismissed sub nom. Mount Wilson FM Broadcasters, Inc. v. F.C.C.*, 884 F.2d 1462 (D.C. Cir. 1989). Due to spacing constraints to Stations KDES(FM), Channel 284B, Palm Springs, California, and KCBO-FM, Channel 287B, San Diego, California, that site, which is located within the boundaries of the Camp Pendleton Marine Corps compound, was the only available location for a transmitter site that would comply with the minimum distance separation requirements of Section 73.207 of the Commission's Rules. The allotment was made based upon the reasonable likelihood, as represented by a military official, that a site on Camp Pendleton might be made available for broadcast use. However, the U.S. Marine Corps strongly opposed the applications filed which proposed sites on Camp Pendleton, stating that they would not approve the erection of a commercial broadcast tower on military land to accommodate Channel 285A.²

3. As a result of the military's determination, a majority of the applicants for the allotment requested waivers of Section 73.207 to permit short-spacings ranging in distance from 4.1 and 5.9 kilometers to Station KKGO(FM), Channel 286B, Los Angeles, California. Although one applicant had specified a site allegedly on non-military property which required a waiver of the city-grade coverage requirements of Section 73.315 of the Commission's Rules, it was subsequently demonstrated that the purportedly conforming site was in fact within the boundaries of Camp Pendleton and unavailable for broadcast use. Regardless, the allotment was upheld on review by the Commission on the grounds that it was correctly made based on a factual determination that was reasonable at that time, and because it would have been unfair to rescind the allotment without considering the applicants' designated short-spaced sites outside of Camp Pendleton and their associated waiver requests. See *San Clemente, California*, 3 FCC Rcd at 6728, 6729.

4. Among the issues specified in the *Hearing Designation Order* was whether the applicants' proposals conformed to the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, and, if not, whether circumstances existed to warrant waivers. See *Hearing Designation Order*, 4 FCC Rcd 8399 (1989).

5. On the basis of a comparative hearing the Administrative Law Judge ("ALJ") determined that none of the applicants demonstrated that the public interest benefits accruing from a grant of their waiver requests were sufficiently compelling to offset the magnitude of the proposed spacing deficiency.³ See, *Megamedia*, 67 FCC 2d 1527 (1978); *Townsend Broadcasting 7 Corp.*, 62 F.C.C. 511

¹ Coordinates specified for Channel 285A at San Clemente are 33-22-34 and 117-32-20.

² On a previous occasion occurring approximately twenty-six years ago, the Commission considered a request to allot FM Channel 285A to San Clemente. At that time, it was determined that spacing constraints would have confined a transmitter site for Channel 285A to Camp Pendleton. Recognizing that such a site would be unavailable for civilian use, the petitioner requested a waiver of Section 73.207 of the Commission's Rules to accommodate Channel 285A, while a second petitioner requested the reallocation of Channel 300 from Lancaster to San Clemente to accommodate the desire to provide San Clemente with FM service. In view of the unavailability of a fully-spaced

site on land outside of Camp Pendleton to accommodate Channel 285A, that request was dismissed and Channel 300 was reallocated to San Clemente instead. See 2 FCC 2d 647 (1966).

³ Specifically, the applicants specified a site on Clemente Peak, located 61.35 miles from grandfathered Station KKGO(FM), Channel 286B, Los Angeles, California. A distance of 65 miles is required between first adjacent Class A and B channels. The ALJ found that by employing the "ratio method" favored by the applicants, operation from the Clemente Peak site would cause interference to 3.4% of the total population, comprising 330,551 persons within the protected contour of Station KKGO(FM), and 3.8% or 430 sq. km. of the area served by Station KKGO(FM). Moreover, use of the Clemente Peak site would

(1976). The ALJ also found that all of the applicants failed to demonstrate that there were no suitable fully-spaced or less short spaced sites available. See *Tri-Valley Broadcasting Co.*, 66 R.R. 2d 1046 (1989).⁴ Therefore, the applications were denied. *On the Beach Broadcasting*, 6 FCC Rcd 5221 (1991).

6. The Review Board upheld the ALJ's decision on review, finding that the applicants failed to justify their waiver requests or demonstrate that there were sufficiently compelling public interest benefits to be obtained from the proposals to offset the extent of the potential interference that would be created to, and received from Station KKGQ(FM). See 7 FCC Rcd 1346 (1992).

7. The Commission affirmed the decisions below. In reaching its conclusion, the Commission determined that unlike the facts in *Tri-Valley*, *supra*, wherein the applicant made a compelling showing in support of a waiver of Section 73.207, there were no comparable public interest benefits demonstrated to justify the requested waivers here. The Commission found that in addition to the 42,147 persons within the protected contours of the applicants' proposed facilities who would not be able to receive an adequate signal, even if the applicants were able to provide an interference-free signal to the 160,000 persons within their proposed service area, more than double that number, some 330,551 persons, would lose existing service from Station KKGQ(FM). Therefore, the Commission reaffirmed its conclusion that the applicants did not demonstrate that there were compelling public interest benefits to surmount the critical interference considerations, especially since San Clemente has local radio service, and the community is served by in excess of thirty reception services. See *On the Beach Broadcasting*, 8 FCC Rcd at 3127.

8. In light of the fact that throughout the history of this proceeding it was demonstrated that no fully spaced sites for Channel 285A at San Clemente were available outside the confines of Camp Pendleton, in addition to the applicants' failure to establish sufficiently compelling public interest benefits to justify waivers of Section 73.207 of the Rules, the Commission concluded that the allotment may never be utilized by a properly spaced station. See 8 FCC Rcd 3123, 3128 (1993). That determination was reinforced by the persistent and intense opposition of the U.S. Marine Corps to the construction of a commercial broadcast tower on military land. Therefore, the Commission stated that the allotment of Channel 285A at San Clemente may no longer serve the public interest and directed the initiation of this

proceeding looking toward its deletion from the Table of FM Allotments. See Section 1.411 of the Commission's Rules: *Amendment of Section 73.202(b) (Pinckneyville, Illinois)*, 41 RR 2d 69 (1977).

9. In accordance with the above, we shall invite comments on the proposal to delete Channel 285A at San Clemente, California. Any party filing an expression of interest in retaining Channel 285A at San Clemente will be required to provide evidence that military policy against allowing a commercial transmitter to be located on Camp Pendleton has changed.⁶ Therefore, the retention of Channel 285A at San Clemente will require the demonstration by any interested party of the existence of a fully spaced site outside of the boundaries of Camp Pendleton. Additionally, any expressions of interest specifying sites conforming with the minimum distance separation requirements of Section 73.207(b) in response to this Notice will be required to submit specific showings to demonstrate the ability to provide a 3.16 mV/m contour over the entire principal community of San Clemente, as required pursuant to Section 73.315 of the Commission's Rules. Moreover, although site certification is generally not required in the context of a rule making proceeding, we believe the facts in this instance warrant a departure from that policy. Therefore, any interested party will be required to provide information demonstrating that it has taken positive measures to obtain assurances from the owner of its proposed site that it will be able to buy or lease the location specified in its comments. Failure to provide the requested information under the cited circumstances may result in a rejection of the expression(s) of interest.

10. In view of the above, we shall propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to San Clemente, California, as follows:

City	Channel No.	
	Present	Proposed
San Clemente, California	285A, 300B	300B

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein.

create interference by Station KKGQ(FM) to 26.4% of the population, or 42,147 persons, and 14% of the area, or 81 sq. km. served by the proposed short-spaced San Clemente stations. Using the "contour method" the ALJ stated that the San Clemente site would cause interference to 888,777 persons within the area served by Station KKGQ(FM). Conversely, Station KKGQ(FM) would cause interference to 124,944 persons (78.3%) and 51.4% of the area to be served by the proposed short-spaced San Clemente stations. Thus, the ALJ determined that as the degree of interference implicated was clearly unacceptable, and no showing was made regarding the unavailability of lesser short-spaced sites, the applicants failed to justify their requests for waiver of Section 73.207 or to demonstrate any sufficiently compelling public interest factors to offset the magnitude of the spacing deficiency proposed. Therefore, the applications were denied.

⁴ Although one applicant sought to employ a directional antenna to afford protection to Station KKGQ(FM), its amend-

ment was rejected by the ALJ for failure to comply with the provisions of Section 73.215(b)(2)(ii) to provide the requisite contour protection to Station KKGQ(FM) based upon the maximum ERP for a Class B station of 50 kW, in calculating the grandfathered station's protected contour.

⁵ It should also be noted that the record in MM Docket No. 89-503 established that other less short-spaced locations outside of Camp Pendleton are not feasible because of a tall ridge lying between such sites and San Clemente. Thus, it was determined that only a tall tower, which is not considered to be economically feasible, could overcome the height of this ridge. See 6 FCC Rcd 5221 at para. 7.

⁶ Cf. *Crestview and Westbay, Florida*, 7 FCC Rcd 3059 (1992) (proposed transmitter site on a military base did not constitute an available site since it was improbable that authorization would be given for a commercial transmitter site on military property).

12. Interested parties may file comments on or before **January 31, 1994**, and reply comments on or before **February 15, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
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APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.